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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-193

HOMER R. ADCOCK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Homer R. Adcock, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on June 14, 1977, Petition for Rehearing en Banc and for Rehearing denied on July 6, 1977.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals are printed in Appendix A hereto, pp. A1-A17, *infra* and are reported at ..... F.2d ..... Petitioner was tried in the District Court of the Southern District of Iowa by a jury and there is no opinion of that court.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 14, 1977. (Appendix B p. A18, *infra*). Petition for Rehearing and for Rehearing en Banc was timely filed and was denied on July 6, 1977. (Appendix C p. A19, *infra*). Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. *Other Crimes, Wrongs, or Acts.*

Whether evidence of prior similar acts allegedly committed by a defendant in a criminal case, where the defendant has not raised issue of intent, is admissible pursuant to Rule 404(b), *Federal Rules of Evidence*, to show possible motive, intent or scheme or plan.

II. *Out of Court Statements to Show State of Mind.*

Whether out of court statements were properly admissible pursuant to the exception to hearsay rule contained in Rule 803(3), *Federal Rules of Evidence*, in a criminal case to show state of mind of alleged victims, when the out of court statements objected to did not pertain to the state of mind of the alleged victims.

III. Post-Indictment Income.

Whether highly prejudicial evidence concerning the Petitioner's income from liquor companies during the post-indictment year was admissible, over objection, even though there was no allegation or indication that such income was illegal or improper or that the Petitioner had

not declared and paid taxes on said income, but the mere size of the income was prejudicial to the Petitioner.

IV. *Discovery.*

Whether the interests of justice and the Petitioner's rights required that he be afforded broader pre-trial discovery rights than were given him.

STATUTES AND RULES INVOLVED

The statutes involved are 18 U.S.C. §1951, 26 U.S.C. §7201, and 26 U.S.C. §7206(1), which are set forth in Appendix D (pp. A20-A23, *infra*). The Federal Rules of Evidence involved are Rule 403, *Federal Rules of Evidence*, Rule 404(b), *Federal Rules of Evidence*, Rule 802, *Federal Rules of Evidence*, and Rule 803(3), *Federal Rules of Evidence*, which are set forth in Appendix E (pp. A24-A31, *infra*).

STATEMENT OF THE CASE

Petitioner was convicted in the United States District Court for the Southern District of Iowa on two counts charging violations of the Hobbs Act, 18 U.S.C. §1951, three counts charging willful evasion of federal income taxes, 26 U.S.C. §7201, for the years 1969, 1970 and 1971, and three counts charging that he filed false income tax returns for the same years, 26 U.S.C. §7206(1). He was sentenced to three year concurrent sentences on all counts and fines totalling $20,000 were imposed.

The Petitioner, a man 67 years of age, was a member of the Iowa Liquor Control Commission (Commission) from July 1, 1959, to December 31, 1971, having been appointed by Governor Herschel Loveless and reappointed

by Governor Harold Hughes (III Tr. 209).[1] He served as chairman of the Commission from July 1, 1961 to July 1, 1967, and from July 1, 1969, to July 1 1971. (III Tr. 211).

Mario Perelli-Minetti, General Manager of the California Wine Association, alleged that he had paid the Petitioner approximately $20,000 per year from 1965 through 1971, in order to maintain and promote the marketing of his company's wines in the state of Iowa. (Minetti Tr. 20 *et seq.*). Numerous false invoices documenting the method through which Perelli-Minetti alleged that he withdrew the cash from his company which he claimed to have paid the Petitioner were received in evidence, but Perelli-Minetti admitted that the documents demonstrated only that approximately $20,000 per year was taken out of the company's operating funds and did not show that any money was paid to the Petitioner. (Minetti Tr. 196-197).

Clair Fischell, a liquor company representative, also testified that he made three $500 payments to the Petitioner in the years 1970 and 1971. (II Tr. 110-112). Fischell admitted that he was well acquainted with Mario Perelli-Minetti and that the two have business arrangements together. (II Tr. 113). Moreover, he admitted that he originally testified before a Grand Jury in March, 1976, that he never gave money to the Petitioner, that no money was ever solicited from him, and that he had never heard of punitive delistings of brands by the Commission. (II Tr. 117-119). Moreover, he admitted that he changed his testimony before the Grand Jury in May, 1976, only after

1. "Tr." references are to the four-volume transcript of proceedings in the District Court. "Minetti Tr." references are to the two-volume transcript of the testimony of Mario Perelli-Minetti in the District Court, which transcript was prepared separately from the transcript of all other trial proceedings.

he knew the Petitioner had been indicted. (II Tr. 121-122).

The Government's case, both on the extortion and tax charges, was predicated on the Petitioner's alleged receipt of the aforementioned payments from Mario Perelli-Minetti and Clair Fischell. The tax charges were based exclusively on the Petitioner's alleged specific omission of the same payments which formed the basis of the extortion charges. There was no attempt to establish his guilt on the basis of a net worth theory. Indeed, William F. Lyons, the Special Agent of the Internal Revenue Service who was in charge of the investigation of the Petitioner, admitted that after an investigation of the Petitioner which could be described as "intensive" (III Tr. 179), the Government failed to find any independent evidence, apart from the testimony of Mario Perelli-Minetti and Clair Fischell, that the Petitioner actually received the money he was accused of receiving. (III Tr. 197-201).

The Petitioner, testifying on his own behalf, categorically denied that he ever asked for or received money from either Mario Perelli-Minetti (III Tr. 221-223), or from Clair Fischell. (III Tr. 226) At no time did the Petitioner seek to base his innocence upon a claim of mistake, accident, or the lack of the requisite intent or state of mind. Rather, the Petitioner consistently contended that he was innocent because he had never received the money that he was charged with receiving.

The Petitioner appealed his conviction in the District Court to the Court of Appeals for the Eighth Circuit. On June 14, 1977, the Court of Appeals affirmed, in an opinion by Judge Stephenson. Judge Heaney dissented. Opinion, Appendix A, *infra*. The Petitioner's timely Peti-

tion for Rehearing and for Rehearing en Banc was denied on July 6, 1977. Appendix C, *infra*.

BASIS FOR FEDERAL JURISDICTION IN THE LOWER COURTS

Petitioner was tried in the District Court on counts charging violations of 18 U.S.C. §1951, 26 U.S.C. §7201, and 26 U.S.C. §7206(1). Petitioner appealed to the Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. §1291.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has erroneously decided important questions with respect to the Law of Evidence in the Federal Courts which have direct bearing on the administration of the criminal justice system. Moreover, in important respects this holding of the Court of Appeals below is in conflict with decisions on the same issue in other Circuits.

1. Alleged Prior Crimes, Acts or Misdeeds.

The lower court's holding in this case clearly delineates a major problem in the construction of Rule 404(b), *Federal Rules of Evidence* (*Fed. R. Evid.*), pertaining to the admissibility of evidence of alleged prior acts committed by a criminal defendant. In its case in chief the Government sought to introduce testimony of witnesses as to alleged payments they made to the Petitioner prior to the years covered by the indictment. Over Petitioner's objection, Linwood E. Pedrick was permitted to testify that he paid money to the Petitioner from July, 1965, until July 1967. (II Tr. 86-92). Similarly, Raymond Sibbert was permitted

to testify, over Petitioner's objection, that between 1962 and 1967 he paid the Petitioner approximately $5,000. (II Tr. 97-98). The Court of Appeals below held that the evidence was admissible pursuant to Rule 404(b), *Fed. R. Evid.*, in spite of the fact that the issue of intent had never been raised by the Petitioner, who did not seek to deny intent or raise an innocent explanation, but who denied the occurrence both of the acts for which he was charged, and of the prior similar acts.

The Government itself clearly recognized that intent was not at issue in this case, but that the only real issue was whether the Petitioner received payments as alleged. In his closing argument to the jury, counsel for the Respondent stated:

> * * * but just like the tax counts, once you do analyze the extortion count and sift through it, you get down to one basic element, and that is did the Defendant get the money from Mr. Minetti? Interstate Commerce is not a problem. It is just whether he got the money, so that's what the case is all about. (IV Tr. 267).

The holding of the Court of Appeals in this regard is in conflict with decisions of the Courts of Appeals for the Fifth, Sixth and Seventh Circuits on the same issue. The Fifth Circuit, in *United States* v. *Goodwin*, 492 F.2d 1141 (5th Cir. 1974), adhered to its long-standing position by holding that evidence of other criminal acts was inadmissible to show intent if intent is not a contested aspect of the case. *Id.* at 1150-1152. Although intent was an element of the crimes charged, the court found that the issue was not in serious dispute because the defendant had not attempted to raise an innocent explanation for an act which had admittedly occurred, but rather denied

that he committed the act. *Id.* at 1152. Moreover, if the defendant had actually committed the act there could be no serious question as to his intent:

> Proof of the commission of the act carried with it the evident implication of a criminal intent. In such instances, evidence of the perpetration of other like offenses is not needed to establish criminal motive or intent and is not admissible for such purpose. *Id.* at 1152, quoting *Fallen* v. *United States*, 220 F.2d 946, 948 (5th Cir.), *cert. denied* 350 U.S. 924 (1955).

In *United States* v. *Fierson*, 419 F.2d 1020 (7th Cir. 1969), the defendant was convicted of falsely pretending to be an FBI agent in violation of 18 U.S.C. §912. During its case in chief the Government had elicited the testimony of one Goethceus concerning instances in which the defendant had previously represented himself as an FBI agent. The testimony was admitted for the stated purpose of proving willfulness and intent and appropriate limiting instructions were given to the jury. *Id.* at 1021.

On appeal, the Seventh Circuit reversed, holding that it was reversible error,

> * * * to allow the government, during its case in chief, to introduce evidence of a prior criminal act of the accused in order to show willfulness and intent when, as here, the accused does not, except for demanding an instruction on the requisite willfulness and intent, otherwise put that issue in dispute. *Id.* at 1023.

The court reasoned that when the government produced evidence that the defendant had committed the physical act charged, its case was made out. Only if the defendant had admitted the physical acts, but defended on a theory

such as mistake, would the issue of willfulness and intent have been sufficiently in dispute to permit the introduction of evidence of other similar acts. Where the issue of willfulness and intent was merely formal, in the sense that the defendant was just entitled to an instruction thereon, testimony of prior similar acts was ". . . purely cumulative on the issue for which it was introduced." *Id.* at 1023.

The Seventh Circuit has recently reaffirmed its position in *Fierson* in *United States* v. *Miller*, 508 F.2d 444 (7th Cir. 1974). In *Miller* the Seventh Circuit held that evidence of criminal acts not charged in the indictment was not admissible to establish intent or knowledge until the defendants affirmatively contested their intent and knowledge. *Id.* at 450. The court reasoned that to hold otherwise would permit the exception to devour the rule against the admission of evidence of other crimes.

> Since intent is always an issue, it would emasculate the rule to hold that evidence of other crimes may always be admitted to show criminal intent. *Id.*

The decision of the Court of Appeals in this case, holding that evidence of prior alleged acts of the Petitioner were admissible to show state of mind when the Petitioner had not raised the issue of intent, is also in conflict with holdings of the Court of Appeals for the Sixth Circuit. In *United States* v. *Ring*, 513 F.2d 1001 (6th Cir. 1975), evidence of prior threats was admitted by the trial court to show the criminal intent of the accused, who was charged with mailing threatening letters in violation of 18 U.S.C. §876. In reversing the conviction, the Sixth Circuit held that the evidence of prior threats was inadmissible under the intent exception, even though intent was an element of the offense charged in the indictment. *Id.*

at 1003. The court decided that intent was not genuinely at issue in the case since the defendant had not asserted mistake or an innocent state of mind as a defense.

> When no such defense is asserted, the element of intent may be inferred from the act of mailing but may not be proved in the prosecution's case in chief by similar act evidence. *Id.*

In direct conflict with the holding of the Eighth Circuit in the case at bar that:

> The Government need not await the defendant's denial of intent before offering evidence of similar acts relevant to that issue. Opinion, Appendix A, p. A6, *infra*,

the Sixth Circuit expressly declined to accept the position that intent is in issue whenever it is an element of the offense charged.

> An exception this broad would virtually swallow the rule against admission of evidence of prior misconduct. *United States* v. *Ring*, 513 F.2d at 1009.

This issue not only has been a source of division among the Circuits, as previously described, but also is an issue of major importance in the law of evidence in the Federal Courts and is of significance for the administration of the criminal justice system. The principle that evidence of the commission of prior criminal acts is inadmissible to prove that the accused committed the act for which he was charged in the indictment has been firmly established in our jurisprudence for centuries. This principle, a corollary of the broader principle that the prosecution should not be permitted to put character in issue first, reflects the basic and underlying tenet of our criminal justice system that an accused should be convicted only

because he is found guilty of doing the specific act charged in the indictment or information and should not be convicted simply because he is a bad person generally. *See United States* v. *Fierson*, 419 F.2d at 1022.

Rule 404, *Fed. R. Evid.* was intended to codify this long-standing principle. The exceptions contained in Rule 404(b), *Fed. R. Evid.* were not intended to eradicate the principle, but were simply intended to reflect the well-established exceptions to that principle.

Because of the continuity between the prior law concerning the admissibility of evidence concerning other alleged acts of a defendant and the new Federal Rules of Evidence, the significance of the aforementioned split between the circuits on this issue is not lessened by the fact that the decisions of the Fifth, Sixth and Seventh Circuits referred to antedated the applicability of the Federal Rules of Evidence. Indeed, confusion and conflict between the circuits on this issue antedates the Federal Rules and will not abate without the guidance of this Court.

The case at bar clearly reflects the necessity for preserving the traditional principle within the context of the new Federal Rules of Evidence, and dramatically manifests the abuses which result when the exceptions are permitted to devour the rule. This was a case in which the offenses charged—extortion under the Hobbs Act and violations of Sections 7201 and 7206(1) of the Internal Revenue Code—were totally interrelated. The Government's tax case was not based on a net worth theory, but on alleged specific omissions: the failure of the Petitioner to report the money it was alleged he had extorted. Thus the crucial factual issue in the case was whether the Petitioner in fact received the money the Government charged him with extorting. This was a case in which, as the Fifth

Circuit has stated, "Proof of the commission of the act carried with it the evident implication of a criminal intent." *United States* v. *Goodwin*, 492 F.2d at 1152.

With regard to the Petitioner's receipt of money during the prosecution years, the Government's case hinged on the testimony of two men: Mario Perelli-Minetti and Clair Fischell. The special agent with the Intelligence Division of the Internal Revenue Service who was in charge of the investigation of the Petitioner testified that the investigation of the Petitioner took three years, was nationwide in scope and could accurately be classified as an intensive investigation. (III Tr. 173-179). Nevertheless, the special agent testified that in the course of the investigation no independent evidence was produced that the Petitioner actually received the money which Perelli-Minetti and Fischell claimed to have given him. (III Tr. 197, 200).

The Government's case thus stood or fell with the testimony of Perelli-Minetti and Fischell, and the credibility of those two witnesses was a matter of supreme importance. Moreover, it was clear that both Mario Perelli-Minetti and Clair Fischell had reason to lie in their testimony concerning the Petitioner, either to exculpate themselves (Minetti Tr. 181-198), or to satisfy personal grudges against the Petitioner. (III Tr. 227-228). The admission of the testimony of Linwood Pedrick and Raymond Sibbert produced the result against which the general rule prohibiting evidence of other crimes, wrongs or acts was intended to protect: the jury was permitted to conclude that the Petitioner had committed the act charged, not because the prosecution had shown that to be true beyond a reasonable doubt, but because the Petitioner was calumniated and portrayed to the jury as a man of bad character, likely to have committed the acts with which he was charged.

Finally, it should be noted that if the decision of the Court of Appeals below is read as holding that the other crimes or acts evidence complained of was admissible as evidence of a common plan or scheme pursuant to Rule 404(b), *Fed. R. Evid.*, that holding is also erroneous and in conflict with decisions in other circuits. The testimony of Pedrick and Sibbert complained of did not relate to alleged acts which were part of the scheme or acts charged in the indictment. Rather, the testimony alleged merely that the Petitioner engaged in acts of the same sort as those charged in the indictment. As the Court of Appeals for the Fifth Circuit has held, evidence of other acts is properly admitted only:

> to show a design or scheme on the part of the accused to commit *the specific crime* with which he is charged, but never to show a design or scheme to commit *"crimes of the sort* with which he is charged." *United State* v. *Goodwin*, 492 F.2d at 1152-1153. (emphasis supplied by the court).

2. Out-of-Court Statements Admitted to Show State of Mind.

The lower court's holding in this case, that testimony by Edward Karkule and Linwood Pedrick concerning out-of-court statements of third persons was admissible pursuant to the exception to the hearsay rule contained in Rule 803(3), *Fed. R. Evid.*, to show the state of mind of alleged extortion victims, was an erroneous decision of an important question of the Federal Law of Evidence and one likely to have continuing future impact upon the administration of the criminal justice system.

Over the Petitioner's objection, Edward Karkule testified that in a casual conversation with Mario Perelli-Minetti, the following out-of-court conversation took place:

We were going to lunch in my car, and Mr. Minetti mentioned, "I see you are in Iowa now", and I acknowledged that we were, and he said, "How did you get in there?" I told him that we had purchased 12 existing brands and that when the inventory on those brands were depleted we would put our labels in place of it. His remark was, "Gee, that seems like an easy way to get in."

I knew he was in Iowa, and I asked him how he got into Iowa, and he said "The hard way", or words to that effect. I asked him what it cost, and my best recollection is that he said 20 or 25 thousand and there was no further discussion.

Q. Was there any discussion as to the number of payments Mr. Minetti had made?

A. Yes. I made a remark—You are right. I made a remark where I said, "Well, that didn't seem too bad, because it cost that much or more to market a brand in any state", and he remarked with, "Well, that's every year." (II Tr. 69-70).

Likewise Linwood Pedrick, over Petitioner's hearsay objection, testified that:

". . . my predecessor informed me that this was going on, and at his retirement in July of 1965, I continued the arrangement that had been previously made, and the payments continued until July of 1967." (II Tr. 89).

The lower court held that the testimony was admissible, pursuant to Rule 803(3), *Fed. R. Evid.*, as relevant to the state of mind of alleged victims. Opinion, Appendix A, p. A10, *infra*. However, the court's holding in this regard was error, for the testimony sought to be admitted

to show state of mind of the alleged victims was not pertinent to the state of mind of any alleged victim, and was in fact relevant only for its hearsay value, to show the truth of the matters asserted therein. Nothing that Edward Karkule testified to concerning the statements made to him by Mario Perelli-Minetti was in any way relevant to the state of mind of Mr. Perelli-Minetti. The conversation related by the witness contained nothing more than an off-hand comment by Mario Perelli-Minetti that he was paying money to market his products in Iowa and contains nothing to indicate the state of mind which attended Mr. Perelli-Minetti's payments or the alleged recipient of those payments. By the same token, Linwood Pedrick testified simply that his predecessor had told him that payments were being made in Iowa. His testimony did not disclose anything about the state of mind attending the payments which his predecessor allegedly made.

By holding that the aforesaid testimony was admissible pursuant to Rule 803(3), *Fed. R. Evid.*, the lower court permitted what was intended to be a narrowly circumscribed exception to the hearsay rule to devour the rule itself. The result was that the jurors were allowed to decide the question of the Petitioner's guilt or innocence on the basis of hearsay testimony, contrary to the provisions of Rule 802, *Fed. R. Evid.*

3. Post-Indictment Income.

The holding of the court below in this case, that the Petitioner could be questioned by the Government on cross-examination concerning his income from liquor companies during the post-indictment year, presents serious problems in the interpretation of the Federal Rules of Evidence.

On direct examination the Petitioner, testifying on his own behalf, was asked about his current employment. The following exchange occurred:

> Q. All right. Can you tell us what your present occupation is?
>
> A. I represent a few distilleries, and also I have a half interest in Capital City Realty and Capital City Builders. (III Tr. 207-208).

On cross-examination the Government was permitted, over Petitioner's objection, to elicit the Petitioner's testimony that he received $162,935 in income from liquor companies the first year after he left the Commission, while his salary as commissioner the previous year had been $12,500. (III Tr. 234-235). The Court of Appeals held that the testimony was admissible on the grounds that the Petitioner opened the door and that the testimony was corroborative of the testimony of Mario Perelli-Minetti. Opinion, Appendix A, p. A7, *infra*.

In testifying as to his income from liquor companies after he left the Commission, the Petitioner was not testifying concerning subsequent criminal acts or misdeeds. There was no allegation that his receipt of the income was unlawful or that he had not declared the income and paid the tax due thereon. If the testimony had pertained to subsequent criminal acts or misdeeds, it seems clear that at least one Court of Appeals would have afforded the Petitioner protection from the prejudicial effect of such a disclosure. *See McHale* v. *United States*, 398 F.2d 757, 759 (D.C. Cir.), *cert. denied* 393 U.S. 985 (1968). Moreover, if testimony of subsequent misdeeds or offenses had been involved, even the court below would have permitted such testimony to be admitted only if the subsequent acts or occurrences were integral parts of the offense for which the defendant was charged. *See United States* v. *Gallington*,

488 F.2d 637, 641 (8th Cir. 1973), *cert. denied* 416 U.S. 907 (1974).

In the case at bar, by contrast, even though the testimony complained of was highly prejudicial, the Petitioner received no protection from its prejudicial impact. Through the admission of the evidence, the jury was encouraged to speculate that just because the Petitioner earned $162,935 from liquor companies the year after he left the Commission, he must have been receiving that much money during the years for which he was on trial. But there was absolutely no proof introduced at the time of trial to suggest that the Petitioner received anywhere near that amount of money during the years for which he was being prosecuted. Even if the testimony of the Government witnesses were taken at face value and interpreted in its best possible light, it could only be construed to suggest that the Petitioner may have received from $20,000 to $21,000 per year during the prosecution years. (Minetti Tr. 75-92; II Tr. 110-111). The jury was thus encouraged to speculate, in the absence of any factual foundation, that the Petitioner had received far more during the prosecution years than the Government charged or could prove and was led to convict him on the basis of that speculation.

The court below held that the Petitioner opened the door to the Government's inquiry when on direct examination he testified that he currently represented a few distilleries. Opinion, Appendix A, p. A7, *infra*. A routine question directed to a defendant on direct examination as to the nature of his current employment can hardly be construed as opening the door to an inquiry by the Government as to his earnings several years previously. But even if the door was opened, the Government inquiry was still subject to the provisions of Rule 403, *Fed. R. Evid.* and the inquiry should have been prohibited because of the grave dangers of unfair prejudice involved.

4. Discovery.

In the case at bar the Government had approximately three years (III Tr. 175), with all of the resources and powers of the Federal Government at its disposal, to investigate the Petitioner. By contrast, the Petitioner was denied the right to pre-trial discovery in the form of a bill of particulars or the right to take depositions. The Court of Appeals below upheld the trial court's denial of Petitioner's motion for a bill of particulars and its denial of his motion to take discovery depositions. Opinion, Appendix A, pp. A14, A15, *infra*.

In preparation for his trial, the Petitioner had only the information that the Government was willing to make available. The Government had everything its own way and in its own time, whereas the Petitioner had nothing. All of the Government's discovery was done before the Petitioner was indicted. Witnesses could be, and were, forced to talk to the Government, but the Petitioner had no such power. (*See* Minetti Tr. 132-133). The truth is that the Government in a criminal case has vast powers of discovery through its investigative agencies, search warrants, Grand Juries, and rights of access to bank and credit records. On the other hand, a criminal defendant is unable even to determine the names of prosecution witnesses, let alone search the files that are the source of documentary evidence and question the custodian of any such evidence.

This Court has recently observed:

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial and speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of rules of evidence. *United States* v. *Nixon*, 418 U.S. 683, 709 (1974).

The extremely limited scope of pre-trial discovery afforded the Petitioner herein makes a mockery of any pretense of a belief in "full disclosure of all the facts" in order to maintain the integrity of the criminal justice system.

Had the Petitioner been on trial in the courts of his own state, his right to a fair trial and his right to confront and cross-examine would have received better protection than was the case in his trial in the Federal Court, even though the Federal Courts were intended to be the guardians of individual rights. *See Chapman* v. *State of California*, 386 U.S. 18, 21 (1967). The Iowa Supreme Court has emphasized that discovery must be made available to the criminal defendant and that the courts are obligated to exercise discretion to compel disclosure of evidence by the state. *See State* v. *Eads*, 166 N.W.2d 766, 769 (Iowa 1969). The Iowa Court recognizes that liberal pre-trial discovery is required because as the defendant prepares for trial:

> . . . the State, with unlimited manpower and resources, has already completed its investigation, sometimes even before a formal charge is filed. If perchance the defendant should be able to conduct his own investigation, the trail is often cold when he starts after his evidence and ordinary sources of information have dried up. The argument has been made he already knows most of these things, and this is true if he is guilty. *But at this point he is presumed to be innocent. Id.* (Emphasis supplied by the court).

Because of the inadequacy of his pre-trial discovery rights, the Petitioner herein was unable to ascertain the trustworthiness or reliability of the testimony and documents presented in evidence against him. The result was a trial in which a partial and speculative presentation of the facts occurred because the adversary system was not permitted to function effectively.

CONCLUSION

In the case at bar the court below has sanctioned the Government's attempt to obtain the admission of testimony simply on the mechanical basis that it can be pigeonholed and made to fit in one of the categories or exceptions contained in Rules 404(b) and 803(3), *Fed. R. Evid.* But the preservation of the individual rights of the criminal defendant and the maintenance of the integrity of the criminal justice system require that the mechanical categorization of evidence should not be permitted to overshadow the rationale of the rules. The traditional rules prohibiting the introduction of evidence of other crimes or acts where such evidence is relevant only to the character of a defendant and not to any genuinely contested substantive issue and the rule prohibiting the introduction of hearsay evidence unless one of the clearly defined exceptions is applicable have stood the test of time and must be maintained if the integrity of the criminal justice system is to be protected.

For all the reasons hereinbefore urged, the Petition for a Writ of Certiorari in this case should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 76-2056

United States of America,
Plaintiff-Appellee,
v.
Homer R. Adcock,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Iowa

Submitted: April 12, 1977
Filed: June 14, 1977

Before HEANEY and STEPHENSON, Circuit Judges, and NANGLE,* District Judge.

STEPHENSON, Circuit Judge.

Defendant Adcock appeals from his jury conviction on two counts charging violations of the Hobbs Act (18 U.S.C. § 1951); three counts charging willful evasion of federal income taxes (26 U.S.C. § 7201) for the years 1969, 1970 and 1971; and three counts charging the filing of false income tax returns (26 U.S.C. § 7206(1)) for the

*The Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri, sitting by designation.

same years. The district court[1] imposed a three year concurrent sentence on all counts, and fines totalling $20,000. In this appeal defendant urges numerous trial errors. We affirm.

In brief the evidence indicates that appellant was a member of the Iowa Liquor Control Commission (Commission) for over 12 years, from July 1, 1959, to December 31, 1971. He served as its chairman except for the two year period from July 1, 1967, until July 1, 1969. Iowa is a "controlled" or "monopoly state." Wineries and distilleries sell their products to the Commission, which warehouses and distributes the liquor products to approximately 200 state-operated liquor stores for sale to the public. Companies desiring to sell to the Commission submit proposals to it. If the proposals are accepted the Commission then gives the company a "listing" for its product.

During the period in question it was the practice of the chairman to present proposed orders to the full (three member) Commission, which as a matter of course generally approved the same. Liquor orders were initially prepared by the merchandise manager and submitted to the Commission chairman, who either approved, disapproved, or modified them. The manager testified that appellant, while serving as chairman, changed the orders about ninety percent of the time and often refused to reorder products which were in low supply or out of stock.

Mario Perelli-Minetti (Perelli-Minetti), general manager of the California Wine Association, testified that in

1. The Honorable William C. Hanson, Chief Judge, United States District Court for the Southern District of Iowa. A fine of $10,000 was imposed on Count I of the extortion counts, $5,000 on the 1969 tax evasion count, and $5,000 on the 1970 tax evasion charge.

late July 1965 he came to Iowa for the purpose of retaining a representative for his company. Its previous representative had died in 1964. During the course of his visit he met with appellant in his office at the Commission. Perelli-Minetti testified that appellant, among other things, said, "You don't need a broker. * * * I will take care of your orders. * * * I will see that your products are distributed to the state stores. * * * [N]obody can do as good a job as I can." Perelli-Minetti then related that appellant asked for $20,000 in cash starting in 1965; the same amount each year thereafter, to be paid in $10,000 installments at the spring and fall monopoly state conventions. He testified that $15,000 was actually paid in 1965, $25,000 in 1966 to make up the $5,000 deficit in 1965, and the $20,000 each year thereafter, including the prosecution years of 1969, 1970 and 1971. According to Perelli-Minetti, funds for making the payments to appellant were generated within the company by false invoices and payment was made in cash. Numerous documents corroborative of Perelli-Minetti's testimony were received in evidence. Other evidence supporting the guilty verdict will be discussed in connection with the trial errors urged by appellant.

Appellant testified in his own behalf and denied that he received any funds from Perelli-Minetti or anyone else. He acknowledged receiving $200 a couple of times from Linwood Pedrick, another liquor representative, to buy dinner tickets to a political party. He also admitted receiving a gold watch, a portable tv set and a suit as gifts from Perelli-Minetti on various occasions.

Similar Acts

Appellant objected to Perelli-Minetti's testimony concerning the genesis of the extortion scheme in 1965 and all

subsequent payments prior to the prosecution years. The experienced trial court promptly cautioned the jury[2] that the defendant was on trial only for those acts charged in the indictment and that "Such evidence is only admissible to shed light on the possible motive or intent of the Defendant or the possible existence of a scheme or plan in terms of the crimes charged in this indictment. * * * [E]vidence of other acts you may deem to be similar are not admissible to show the Defendant acted in conformity with those acts at a later date * * *." The court repeated this admonition on several occasions and further instructed on this subject in its final charge to the jury by giving the instruction found in E. Devitt and C. Blackmar, Federal Jury Practice and Instructions § 13.08, at 281 (2d ed. 1970).

The evidence was admissible under Fed. R. Evid. 404(b), which provides:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Here the extortion plan began with the demands for cash made by defendant to Perelli-Minetti in late July 1965.[3] The demands were met by the payments of cash com-

2. *See United States* v. *Calvert*, 523 F.2d 895, 907 (8th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976).

3. Count I of the extortion counts charged that "between on or about January 1, 1964, and on or about April 24, 1971 * * * the defendant * * * did feloniously * * * delay and affect interstate commerce, * * * by extortion * * * to wit: by obtaining on or about April 24, 1971, from Mario Perelli-Minetti * * * property in the form of $10,000 in currency * * *."

mencing in 1965 and continuing without interruption through the prosecution years and until appellant left the Commission on December 31, 1971. It is well established that it is appropriate to show the course of conduct leading to the events which form the basis of the crime charged. *United States* v. *Calvert*, 523 F.2d 895, 907 (8th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976); *United States* v. *Conley*, 523 F.2d 650, 653 (8th Cir. 1975), *cert. denied*, 424 U.S. 920 (1976); *United States* v. *Cochran*, 475 F.2d 1080, 1082-83 (8th Cir.), *cert. denied*, 414 U.S. 833 (1973); *McCormick* v. *United States*, 9 F.2d 237, 238-39 (8th Cir. 1925). The evidence objected to was clearly admissible.

Other similar acts objected to by appellant consisted of proof that appellant received illegal payments from other individuals in the liquor industry under circumstances similar to the payments made by Perelli-Minetti and Clair Fischell[4] during the prosecution years. Linwood Pedrick, a liquor representative, testified over objection to making $200 a month payments to appellant during a two-year period from July 1, 1965, to July 1, 1967. It was his recollection that some of the money was paid to appellant at meetings or conventions. Similarly, Raymond Sibbert, a liquor representative, related that he had made payments totaling approximately $5,000 to appellant at his office over the period 1962 to 1967. He indicated that upon instruction from appellant he placed the money in appellant's desk and closed it. In each instance the trial court gave a cautionary instruction to the jury similar

4. Clair Fischell, an employee of the firm that represented Christian Brothers Wine and Brandy and other liquor companies, testified that during the tax prosecution years of 1970 and 1971 on three occasions he made $500 payments to appellant in his office at the Commission. Fischell indicated that after he removed the money from his wallet appellant would open his drawer and Fischell would put the money therein.

to that previously described in connection with Perelli-Minetti's testimony concerning payments to appellant during non-prosecution years.

Appellant argues that inasmuch as he denied both that the acts for which he was charged occurred, and that the prior similar acts occurred, the issue of intent was never raised and therefore the court erred in admitting the evidence for that purpose. We disagree.

Initially we observe that intent was an essential element of each of the crimes charged. The burden was on the government to prove appellant's guilt beyond a reasonable doubt. It was duty-bound in its case-in-chief to establish all of the essential elements of the crimes charged. The government need not await the defendant's denial of intent before offering evidence of similar acts relevant to that issue. *United States* v. *Conley, supra,* 523 F.2d at 654. At the time the evidence in issue was received the trial court carefully instructed that the "evidence is only admissible to shed light on the *possible* motive or intent of the Defendant or the *possible* existence of a scheme or plan * * *." (emphasis ours.)

Neither the court nor the government can be expected to be clairvoyant. It was not an abuse of discretion for the court to admit relevant evidence on the essential issue of motive and intent unless the court found that its probative value was "substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. *United States* v. *Maestas,* No. 76-1624 (8th Cir., April 14, 1977); *United States* v. *Conley, supra,* 523 F.2d at 654; *United States* v. *Marchildon,* 519 F.2d 337, 346 (8th Cir. 1975); *United States* v. *Olsen,* 487 F.2d 77, 79-80 (8th Cir. 1973), *cert. denied,* 415 U.S. 993 (1974).

It is also well settled that in a tax case the government may show proof of unreported income in prior years

indicating a pattern of understatement of income which is relevant to the issue of willful intent. *United States* v. *Berzinski,* 529 F.2d 590, 593 (8th Cir. 1976); *Amos* v. *United States,* 496 F.2d 1269, 1273-74 (8th Cir. 1974).

Similar acts have also been admitted in evidence in extortion cases in order to show motive and intent. *United States* v. *Braasch,* 505 F.2d 139, 149 (7th Cir. 1974); *United States* v. *Kenny,* 462 F.2d 1205, 1224 (3d Cir.), *cert. denied,* 409 U.S. 914 (1972).

Appellant's income from liquor companies during the post-indictment year

Appellant contends the trial court erred in admitting, over objection, appellant's response to a question by the government on cross-examination that he had received $162,935 from liquor companies the first year after he left the Commission. Appellant's salary as commissioner the previous year had been $12,500. Initially it is noted that appellant opened the door to this line of inquiry when on direct examination he testified that he "represented a few distilleries" after leaving the Commission. The government was thus entitled to inquire into this area further. *United States* v. *Sparrow,* 470 F.2d 885, 888 (10th Cir. 1972), *cert. denied,* 411 U.S. 936 (1973); *United States* v. *Hicks,* 382 F.2d 158, 163 (D.C. Cir. 1967). Moreover, the testimony was corroborative of the testimony of Perelli-Minetti that appellant told him that he was leaving the Commission but not to worry, his secretary would still be there. According to Perelli-Minetti, appellant further told him "I can do just about as much for you outside the Commission as I could inside the Commission." We are satisfied the court did not abuse its discretion in admitting this testimony. *Cf. Sears* v. *United States,* 490 F.2d 150, 152-53 (8th Cir.), *cert. denied,* 417 U.S. 949 (1974).

Instructions

Appellant urges error in the trial court's refusal to give his requested instruction No. 25, which refers to the absence of any duty on the part of the defendant in a criminal case to call witnesses or produce evidence, and instruction No. 37, which instructs the jury that they were not to weigh the evidence on the basis of the number of witnesses testifying on either side. After examining the instructions as a whole we are satisfied that the court fully instructed on the presumption of innocence of the defendant. The court further instructed that the burden of proof is "always upon the prosecution to prove guilt beyond a reasonable doubt," and that "the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence." Further, the matter of credibility of witnesses was fully covered. We find appellant's claim of error with respect to the instructions to be without merit.

Out-of-court statements to show state of mind

The appellant contends the district court erred in admitting certain testimony of Edward Karkule, Linwood Pedrick, Perelli-Minetti and Joseph Vinti and in instructing the jury concerning state of mind testimony. Edward Karkule, then a liquor representative doing business with the state of Iowa, testified over objection by appellant that in 1970 or 1971 he had a discussion with Perelli-Minetti over the marketing of wine in Iowa. The court before admitting the testimony cautioned the jury that "such testimony is not being admitted to prove the truth of any matters he asserts but only to show the state of mind of the alleged victim." Karkule then testified that "I asked him how he got into Iowa, and he said 'The hard way' * * *. I asked him what it cost, and my

best recollection is that he said 20 or 25 thousand * * *. * * * I said, 'Well, that didn't seem too bad * * *' and he remarked with, 'Well, that's every year.'" Linwood Pedrick, another liquor representative, testified that he, too, had paid money to the defendant and that in doing so he was continuing the practice which had been set up by his predecessor, Coates. Pedrick stated "my predecessor informed me that this was going on, and at his retirement in July of 1965, I continued the arrangements that had been previously made * * *." (Prior to receiving this testimony the court repeated its similar acts and state of mind instructions.) The appellant argues that Karkule's and Pedrick's statements were hearsay and therefore inadmissible.

In a Hobbs Act case such as this, the state of mind of the extortion victims is an essential element of the crime charged. The government must establish that the defendant induced the victim to part with his money or property and that the defendant did so by extortion. Extortion may be committed either by use of fear, or "under color of official right." 18 U.S.C. § 1951(2). Extortion "under color of official right" is the wrongful taking by a public officer of money or property not due him or his office, whether or not the taking was accomplished by force, threats or use of fear. The term "fear" includes fear of economic loss. Unless the payments are made under some form of compulsion there is no extortion. The appellant recognized that the state of mind of the alleged victims was crucial to conviction. At the close of the evidence the appellant proffered an instruction which defined bribery and extortion and cautioned the jury that defendant could not be convicted under the indictment for bribery. Bribery, of course, connotes a voluntary offer to obtain gain, where extortion connotes some form of coercion. Under the indictment defendant could not be

convicted of bribery. Thus the state of mind of the victim is crucial and evidence thereof is admissible. Fed. R. Evid. 803(3).

In this circuit it is well settled that testimony showing the state of mind of the victim through out-of-court statements is admissible in an extortion case. *United States* v. *Biondo*, 483 F.2d 635, 643 (8th Cir. 1973), *cert. denied*, 415 U.S. 947 (1974); *Nick* v. *United States*, 122 F.2d 660, 670-73 (8th Cir. 1941). In *United States* v. *Hyde*, 448 F.2d 815, 845 (5th Cir. 1971), *cert. denied*, 404 U.S. 1058 (1972), an extortion case, the court permitted the victim's attorney to testify that his client told him of receiving an extortion demand. The court recognized that:

> The victim's fearful state of mind is a crucial element in proving extortion. The testimony of victims as to what others said to them, and the testimony of others as to what they said to victims is admitted not for the truth of the information in the statements but for the fact that the victim heard them and that they would have tended to produce fear in his mind. As Professor Wigmore has pointed out:
>
> > Wherever an utterance is offered to evidence the *state of mind* which ensued *in another person* in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the Hearsay rule is concerned.
>
> Wigmore, Evidence § 1789 (1940). *See* Nick v. United States, *supra*. Thus it is no ground for objection that the third person making the statement to the victim is not produced as a witness or even that he is not named. The defendant's right of cross examination is preserved in that he can ask the witness whether he truly heard these fear-producing statements.

See also United States v. *Freeman*, 514 F.2d 1184, 1190-91 (10th Cir. 1975); *United States* v. *Stirone*, 311 F.2d 277 (3d Cir. 1962). We conclude that Karkule's and Pedrick's testimony was properly admitted. It follows that the state of mind instruction given by the court as a part of its final instructions to the jury was proper and consistent with the cautionary instructions given by the court during the trial when this testimony was received.[5]

Appellant further objects to the admission of testimony of Perelli-Minetti relating to his part of the conversations with his company's Eastern Division Sales Manager in New York, Charles Inzinna, involving the method by which the extortion payments would be raised. The court limited Perelli-Minetti to his part of the conversation. Perelli-Minetti testified that he requested Inzinna to send him a fictitious invoice for use in making a check and that such invoices were furnished and used by him. Since Perelli-Minetti was testifying as to what he said and did,

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5. The government further urges that Perelli-Minetti's statement to Karkule that he was paying $20,000 to $25,000 a year to do business in Iowa was also admissible to rebut a charge of recent fabrication. Fed. R. Evid. 801(d)(1)(B). Counsel for defendant suggested in his cross-examination of Perelli-Minetti that Perelli-Minetti was not paying defendant but was in fact stealing from his employer. The government also urges that Coates' statement to Pedrick, even if considered hearsay, was admissible under Fed. R. Evid. 804(b)(3) as a statement against penal interest. Coates at the time of trial was unavailable (deceased), and his statement was, in fact, in violation of his penal interest. Bribery was a violation of the Iowa statutes and in violation of 18 U.S.C. § 1952 (interstate travel in aid of racketeering enterprise). We need not reach these contentions because we are satisfied the statements were properly received to show state of mind. However, in the case of Coates' statements to Pedrick before his death, it must be conceded they contained the circumstantial guarantee of truthfulness and reliability envisioned by the exception to the hearsay rule.

there was no hearsay problem. Fed. R. Evid. 801, Advisory Committee Note to Subdivision (d).

Appellant also contends the trial court erred in admitting the testimony of Joseph Vinti, who identified phony invoices utilized by Inzinna and checks endorsed by Vinti's deceased father. Vinti's testimony objected to by appellant related to conversations with Inzinna which were not offered to prove the truth of Inzinna's statements but were offered to show the circumstances surrounding Inzinna's dealings with Vinti and Vinti Advertising, Inc. and the termination of that relationship. It was a collateral matter and in no way prejudicial to defendant.

Closing Arguments

In the closing arguments counsel for the government commented:

> Mr. Adcock testified that he is in the habit of going to Las Vegas and taking a large sum of cash, and it wasn't too clear from the testimony whether it was $20,000 or $40,000.
>
> MR. GILL: I am going to object to that. The testimony was clear. It was $15,000.
>
> THE COURT: Whatever it was. The jury will determine what the record is. Proceed. Let's have less interruption unless there is real substance to it.

After reviewing the testimony we echo the expressed sentiment of the trial court. There is little substance to appellant's claim that government counsel misrepresented the testimony of appellant and thus deprived him of a fair trial.

Motion for New Trial

Appellant complains because the trial court denied his motion for new trial without granting his request for an oral hearing thereon. This is a matter within the discretion of the trial court. *United States* v. *Pitts*, 508 F.2d 1237, 1241 (8th Cir. 1974). We find no abuse of discretion on this record.

Motion for Bill of Particulars

The trial court denied appellant's motion for a bill of particulars filed September 21, 1976, on the grounds that it was untimely and without merit. Indictments were returned in this cause on April 13, 1976, and June 18, 1976. The case was initially set for trial on July 12, 1976, and continued until August 9, 1976. On July 30, 1976, appellant moved for a continuance upon the ground more time was needed to prepare his defense. The motion was granted and trial was set for October 18, 1976.

Appellant claims the court abused its discretion in denying the bill of particulars on the ground the motion was untimely. He argues that under Local Rule 29 "Written motions in criminal cases are discouraged until completion of the Omnibus Hearing Procedure set forth in [Local] Rule 31." The latter calls for a hearing, the purpose of which is to encourage voluntary disclosure by the government and eliminate written motion practice except when necessary. Appellant contends any untimeliness on his part was due solely to his reliance on these rules which were not complied with.

The trial court took note of this same contention and in its ruling stated:

> [I]t has been this Court's understanding that no formal omnibus hearing would be held, and that the

parties would informally comply with Local Rule 31. This understanding was reinforced by the Court's informal meeting with counsel on August 4, 1976. It is significant to note that the pending motion was filed some six weeks after that meeting, and some four weeks prior to the impending October 18, 1976 trial date for this case. * * * Because the nature of the charges against the defendant are adequately disclosed to him, and in view of the detailed nature of the indictments and the fact that the Government has already disclosed much information to the defendant, the request, even if timely, must be denied.

After reviewing the record we are satisfied the trial court did not abuse its discretion in denying the bill of particulars. The record indicates that the government informed the defendant of the sources of unreported income, both during the prosecution and pre-prosecution years. The two indictments in this case total seven pages and are detailed. They set forth in factual terms the elements of the offenses charged. The defendant was sufficiently apprised of what he must be prepared to meet. The language was definite and certain enough to protect defendant's constitutional guarantee against double jeopardy. *See United States* v. *Brown*, 540 F.2d 364, 371 (8th Cir. 1976).

Discovery

Appellant makes the general allegation that "The interest of justice and the defendant's rights under the Sixth Amendment required that he be afforded broader pretrial discovery rights than were given him." He argues that he should have been afforded the same broad discovery rights permitted in civil litigation. An examination

of the record indicates that the government furnished appellant a vast amount of material requested by him in his Rule 16(a), Fed. R. Crim. P., motion for discovery and inspection. It appears that appellant's principal complaint arises from the court's denial of his Rule 15(a), Fed. R. Crim. P., motion (filed simultaneously with his motion for a bill of particulars) to take the discovery depositions of 19 potential government witnesses. In denying the motion the trial court noted that depositions in criminal cases are governed by Rule 15(a) and that the Rule's principal objective is the preservation of evidence for use at trial. It is not to provide a method of pretrial discovery. We agree. *See* 8 J. Moore's Federal Practice ¶ 15.01[3] at 15-8 (1976). *See also United States* v. *Steffes*, 35 F.R.D. 24 (D. Mont. 1964). We also note as did the trial court that appellant's request was a blanket one. There was no showing of "exceptional circumstances" which would justify the request. We conclude that appellant's contention that he was not allowed proper discovery is without merit. Discovery matters are committed to the sound discretion of the trial court and are reviewable only upon an abuse of that discretion. *United States* v. *Crow Dog*, 532 F.2d 1182, 1189 (8th Cir. 1976). We find no abuse of discretion here.

Sufficiency of the Evidence

At the close of all the evidence, the defendant moved to withdraw the issue of whether defendant made any threat within the meaning of 18 U.S.C. § 1951 on the grounds of insufficient evidence. This motion was renewed at the close of all the evidence. Defendant also moved for judgment of acquittal on all counts urging insufficiency of the evidence.

18 U.S.C. §1951 provides in part as follows:

> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

The trial court properly instructed the jury that extortion "may be committed either by use of fear or 'under color of official right.'" *United States* v. *Brown*, 540 F.2d 364, 371-73 (8th Cir. 1976). Here the evidence was overwhelming that appellant obtained funds under "color of official right." Furthermore, the trial court properly instructed the jury that "The term 'fear' does not necessarily refer to physical fear or fear of violence. It includes fear of economic loss." *See United States* v. *Brown, supra,* 540 F.2d at 373 n.6. Taking the evidence in the light most favorable to the jury verdict, we are satisfied that there was ample evidence indicative of a fear of economic loss by Perelli-Minetti which warranted the submission of this issue to the jury.

Appellant's general motion for judgment of acquittal on all counts based on insufficient evidence to convict is without merit and does not warrant further discussion.

Affirmed.

HEANEY, Circuit Judge, dissenting.

I respectfully dissent. In my view, it was appropriate to admit the testimony of Perelli-Minetti on both the initial demand for cash and the payments pursuant to that demand from 1965 through 1971. This testimony was admissible to show the course of conduct leading to the events which formed the basis of the crime charged. It was error, however, to receive the testimony of Pedrick and

Sibbert. The probative value of this testimony was substantially outweighed by the danger of unfair prejudice. In my judgment, their testimony was not clear and convincing; rather, it was indefinite and vague. Moreover, I am unable to determine how this evidence was relevant to the issue of Adcock's intent. Neither witness testified that Adcock demanded the payments; they stated only that they paid money to him.

Also, it was clearly inappropriate to admit Karkule's testimony. It was received, as the majority points out, on the theory that it tended to show Perelli-Minetti's state of mind, namely, that he was coerced into making the payments. I believe it showed no such thing. At most, it established that Perelli-Minetti made payments to Adcock. Karkule was not asked whether the payment was a bribe or whether it was extorted. Yet, the nature of the payment was the crucial issue in this case.

I agree that the trial court properly denied discovery on the grounds that it was not timely. Were it not for this factor, I would hold that there was a particularized need to discover the testimony of the government witness. In effect, Adcock was forced to defend against charges different than those raised in the indictment and to do so without adequate opportunity to investigate and prepare his defense.

A true copy.

Attest:

Clerk, U. S. Court of Appeals,
Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 76-2056

September Term, 1976

United States,
Appellee,

vs.

Homer R. Adcock,
Appellant.

JUDGMENT

(Filed June 14, 1977)

APPEAL FROM the United States District Court for the Southern District of Iowa.

THIS CAUSE came on to be heard on the original designated record of the United States District Court for the Southern District of Iowa and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed in accordance with majority opinion.

June 14, 1977

APPENDIX C

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

76-2056

September Term, 1976

United States,
Appellee,

vs.

Homer R. Adcock,
Appellant.

Appeal from the United States District Court
for the Southern District of Iowa

ORDER DENYING REHEARING

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

July 6, 1977

APPENDIX D

18 U.S.C. § 1951

§ 1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the Dis-

trict of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

June 25, 1948, c. 645, 62 Stat. 793.

26 U.S.C. § 7201

§ 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851.

26 U.S.C. § 7206

§ 7206. Fraud and false statements

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance.—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) Fraudulent bonds, permits, and entries.—Simulates or falsely or fraudulently executes or signs any bond, permit, entry or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) Removal or concealment with intent to defraud.—Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) Compromises and closing agreements.—In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully—

(A) Concealment of property.—Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) Withholding, falsifying, and destroying records.—Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 852.

APPENDIX E

Rule 403, Federal Rules of Evidence

RULE 403—EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404, Federal Rules of Evidence

RULE 404—CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character evidence generally. Evidence of a person's character or trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 802, Federal Rules of Evidence

RULE 802—HEARSAY RULE

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 803, Federal Rules of Evidence

RULE 803—HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression.—A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance.—A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition.—A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment.—Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection.—A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method

or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6).—Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports.—Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics.—Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry.—To prove the absence of a record, report, statement, or data compila-

tion, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations.—Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates.—Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records.—Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property.—The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property.—A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents.—Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications.—Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises.—To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history.—Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation concerning boundaries or general history.—Reputation in a community, arising before the

controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

(21) Reputation as to character.—Reputation of a person's character among his associates or in the community.

(22) Judgment of previous conviction.—Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries.—Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception un-

less the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

No. 77-193

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1977

HOMER R. ADCOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his conviction in this criminal tax case on the ground that he was prejudiced by the admission of evidence of offenses similar to those alleged in the indictment.

After a jury trial in the United States District Court for the Southern District of Iowa, petitioner was convicted on two counts of extorting money, in violation of the Hobbs Act, 18 U.S.C. 1951, three counts of willfully attempting to evade income taxes for the years 1969, 1970, and 1971, in violation of 26 U.S.C. 7201, and three counts of filing false income tax returns for the same years, in violation of 26 U.S.C. 7206(1). Petitioner was sentenced to concurrent terms of three years' imprisonment on each of the eight counts; he was fined a total of

$20,000 (Pet. App. A1-A2). The court of appeals affirmed, with one judge dissenting (Pet. App. A1-A17).

Petitioner was a member of the Iowa Liquor Control Commission from 1959 through 1971, where he served as chairman from July 1, 1961, to July 1, 1967, and from July 1, 1969, to July 1, 1971 (Pet. App. A2). The Commission maintained a monopoly on the retail sale of wines and liquors in Iowa, and companies desiring to market their wines and liquors were required to obtain a "listing" from the Commission (*ibid.*). Mario Perelli-Minetti, general manager of the California Wine Association, testified that each year from 1965 through 1971 he paid petitioner $20,000 in cash (Pet. App. A2-A3). Petitioner did not report these amounts on his income tax returns for 1969, 1970, or 1971. Numerous documents tending to corroborate Perelli-Minetti's testimony were admitted in evidence (Pet. App. A3). Clair Fischell, a representative of various liquor companies, testified that during the years 1970 and 1971 he made three $500 payments to petitioner (Pet. App. A5, n. 4). Petitioner testified and denied receiving money from Perelli-Minetti, Fischell, or anyone else (Pet. App. A3).

Another liquor company representative, Linwood Pedrick, testified that he had made payments to petitioner of $200 in cash each month during a two-year period between 1965 and 1967, similar to those made by Perelli-Minetti and Fischell during the prosecution years (Pet. App. A5). Raymond Sibbert, another liquor company representative, testified that he paid petitioner a total of $5,000 in cash from 1962 through 1967 (*ibid.*). It was undisputed that none of these payments was reported on petitioner's tax returns.

1. Petitioner argues (Pet. 6-13) that the trial court erred in admitting the testimony of Pedrick and Sibbert

that they made cash payments to him in years prior to the prosecution years. Relying on Rule 404(b), Federal Rules of Evidence (see Pet. App. A24-A25), petitioner claims that this testimony was inadmissible either as proof of intent or as evidence of a common plan or scheme.

But in each instance, the trial court gave a cautionary instruction to the jury that the petitioner was on trial only for those acts charged in the indictment and that the evidence was admissible only to shed light on possible motive or intent, or the possible existence of a scheme or plan in terms of the crimes charged in the indictment (Pet. App. A4-A6). Although petitioner urges that the issue of intent was never raised and therefore the court erred in admitting evidence of his intent, the court of appeals correctly stated that since "intent was an essential element of each of the crimes charged" (Pet. App. A6), the government was "duty-bound in its case-in-chief to establish all of the essential elements of the crimes charged" (*ibid.*). "[I]ntent in virtually all offenses is material, and is therefore a part of the case to be proved in chief; * * * unless the precise defense be disclosed in advance, the prosecution may in fairness assume that intent may come into issue." II Wigmore, *Evidence*, § 307 (3d ed., 1940). The government therefore was not required to await petitioner's denial of intent before offering evidence of similar acts. *United States* v. *Conley*, 523 F. 2d 650, 654 (C.A. 8), certiorari denied, 424 U.S. 920; *United States* v. *Mastrototaro*, 455 F. 2d 802 (C.A. 4). Accordingly, the evidence of petitioner's similar conduct was admissible to show a pattern of unreported income prior to the prosecution years (*United States* v. *Berzinski*, 529 F. 2d 590, 593 (C.A. 8); *Amos* v. *United States*, 496 F. 2d 1269, 1273-1274 (C.A. 8)) and to show motive and intent with respect to the counts charging violation of the Hobbs Act. *United*

States v. *Kenny*, 462 F. 2d 1205, 1224 (C.A. 3), certiorari denied *sub nom. Kropke* v. *United States*, 409 U.S. 914; *United States* v. *Braasch*, 505 F. 2d 139, 149 (C.A. 7).

Contrary to petitioner's argument (Pet. 12-13), the decision below does not conflict with *United States* v. *Goodwin*, 492 F. 2d 1141 (C.A. 5). There, the defendant was charged with importing marijuana and with conspiracy to do so and the prosecution introduced evidence of a similar offense committed many months after the crimes charged in the indictment. Although the court recognized that evidence of the commission of a separate crime was admissible to show intent or a design or plan, it held that in the circumstances of that case the evidence of an isolated incident far removed in time from the indictment was prejudicial because of "the total absence of need for * * * [such] evidence" (492 F. 2d at 1152). Here, however, the evidence showed a pattern of identical conduct prior and proximate to the prosecution years. Such evidence tended to prove the existence of a common plan or scheme (see Pet. App. A2-A3, A5) and therefore was admissible.[1]

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[1] *United States* v. *Fierson*, 419 F. 2d 1020 (C.A. 7), *United States* v. *Miller*, 508 F. 2d 444 (C.A. 7), and *United States* v. *Ring*, 513 F. 2d 1001 (C.A. 6), upon which petitioner relies (Pet. 8-9), likewise are distinguishable. Those cases involved evidence of prior similar crimes (falsely pretending to be an FBI agent, interstate transportation of stolen vehicles, and mailing threatening letters) in which the prior offenses were wholly independent and separate events from those charged in the indictments. Here, however, the evidence of petitioner's prior extortion of cash payments from liquor company representatives showed a common plan or scheme.

2. Petitioner argues (Pet. 13-15) that the testimony of the witnesses Karkule[2] and Pedrick[3] was improperly admitted as an exception to the hearsay rule because it did not show the state of mind of the extortion victims (see Rule 803(3), Federal Rules of Evidence). The testimony of Karkule can be interpreted as reflecting the bitterness of Perelli-Minetti over the large amount of extortion money petitioner required him to pay each year.[4] The reasonable inference to be drawn from Pedrick's testimony is that Coates, like Pedrick, recognized

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[2] Karkule testified (Pet. 13-14) that he had the following conversation with Mario Perelli-Minetti:

> We were going to lunch in my car, and Mr. Minetti mentioned, "I see you are in Iowa now", and I acknowledged that we were, and he said, "How did you get in there?" I told him that we had purchased 12 existing brands and that when the inventory on those brands were depleted we would put our labels in place of it. His remark was, "Gee, that seems like an easy way to get in."
>
> I knew he was in Iowa, and I asked him how he got into Iowa, and he said "The hard way", or words to that effect. I asked him what it cost, and my best recollection is that he said 20 or 25 thousand and there was no further discussion.
>
> Q. Was there any discussion as to the number of payments Mr. Minetti had made?
>
> A. Yes. I made a remark—You are right. I made a remark where I said, "Well, that didn't seem too bad, because it cost that much or more to market a brand in any state", and he remarked with, "Well, that's every year."

[3] Pedrick testified (Pet. 14) that "* * * my predecessor [Coates] informed me that this was going on, and at his retirement in July of 1965, I continued the arrangement that had been previously made, and the payments continued until July of 1967."

[4] Karkule's testimony as to Perelli-Minetti's statements to him regarding the payments to petitioner was also admissible to rebut a charge of recent fabrication. See Rule 801(d)(1)(B), Federal Rules of Evidence.

that the extortion payments to petitioner were necessary in order to obtain a "listing" from the Commission for their products. The testimony therefore was admissible. *United States* v. *Biondo*, 483 F. 2d 635, 643 (C.A. 8), certiorari denied, 415 U.S. 947; *Nick* v. *United States*, 122 F. 2d 660, 670-673 (C.A. 8).

3. Petitioner also contends (Pet. 15-17) that the trial court erred in admitting evidence that petitioner received some $163,000 from liquor companies the first year after he left the Commission. As the court of appeals pointed out (Pet. App. A7), petitioner opened the door to this testimony when he testified that he "represented a few distilleries" after leaving the Commission. See *United States* v. *Sparrow*, 470 F. 2d 885, 888 (C.A. 10), certiorari denied, 411 U.S. 936. Contrary to petitioner's argument (Pet. 17), the testimony did not invite the jury to speculate that "he must have been receiving that much money" during the prosecution years. However, as the court of appeals pointed out (Pet. App. A7), this evidence did tend to corroborate testimony by Perelli-Minetti that petitioner told him, "I can do just about as much for you outside the Commission as I could inside the Commission." The trial court therefore did not abuse its discretion in admitting the disputed testimony. Cf. *Sears* v. *United States*, 490 F. 2d 150, 152-153 (C.A. 8), certiorari denied, 417 U.S. 949.

4. Finally, petitioner argues (Pet. 18-20) that the trial court deprived him of pretrial discovery. But the court of appeals found that "the government informed the defendant of the sources of unreported income, both during the prosecution and pre-prosecution years" (Pet. App. A14), and that "the government furnished appellant a vast amount of material requested by him in his Rule

16(a), Fed. R. Crim. P., motion for discovery and inspection" (Pet. App. A15). As for the complaint (Pet. 18) that petitioner was denied the right to take pretrial depositions under Rule 15(a), Fed. R. Crim. P., it is the function of that Rule, as the court of appeals pointed out (Pet. App. A15), to preserve evidence for use at trial and not to provide a method of pretrial discovery. See 8 Moore's *Federal Practice*, para. 15.01(3), p. 15-8 (1977); *United States* v. *Steffes*, 35 F.R.D. 24 (D. Mont.).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

OCTOBER 1977.